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SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1958

No. 246

JOHN SYPERT,

Petitioner,

vs.

HONORABLE JULIUS H. MINER, a Judge of the United States District Court for the Northern District of Illinois, Eastern Division,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above case on April 28, 1959.

OPINIONS BELOW.

The opinion of the District Court was not reported. The opinion of the Court of Appeals on April 28, 1959, appears at 266 F. 2d 196. Much of what is in this opinion is not in the record, as we will demonstrate.

JURISDICTION.

The judgment of the United States Court of Appeals, for the Seventh Circuit was made and entered on April 28, 1959. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTION PRESENTED

Whether under Section 1404(a), Title 28 U.S.C.A., there can be more than one determination of the proper forum? Specifically, after a motion to transfer was denied in 1954, and after a trial in 1958 which resulted in a disagreement but no change in the factual situation, may another judge to whom the cause is assigned transfer it to a district across the country?

STATUTE INVOLVED.

This case involves 28 USC, Section 1404(a), 62 Stat. 937 (1948) which provides as follows:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

STATEMENT OF THE CASE.

The petitioner on August 18, 1952, lost an eye while in the employ of Chance-Vought Aircraft Corporation in Dallas, Texas, through the explosion of an oxygen generator manufactured by the Bendix Aviation Corporation. The defendant was not then licensed to do business in Texas, nor amenable to service of process there. The plaintiff engaged Texas counsel who found defendant could not be served within that State. On September 28, 1953, he learned that defendant was doing business in California and forwarded the cause to California lawyers who filed suit on December 8, 1953, but defendant pleaded the California one-year statute of limitations and the suit was dismissed.

The present suit was thereupon instituted, on August 3, 1954, in the United States District Court for the Northern District of Illinois, at Chicago. In the meantime the defendant had qualified to do business in Texas.

The defendant filed its answer in the instant case, and later on October 26, 1954, filed a motion to transfer the cause to the District Court in Texas. This motion, after extended hearing, was denied by Judge Hoffman, on whose calendar the case was then pending.

On January 13, 1958, after this case had been pending nearly four years, it was reached for trial before Judge Hoffman. On February 4, 1958, the jury disagreed.

Shortly thereafter, Judge Julius H. Miner was appointed to the district bench and this case was assigned to him for trial. The defendant filed another motion to transfer. It was granted by Judge Miner solely on the basis of the

affidavit and suggestions of the defendant. (There were also counter-affidavits filed.) Defendant's motion raised no new grounds. There was no transcript of testimony of the first trial, and respondent did not know what had occurred there. Nor did defendant even summarize what the witnesses had testified to.

JURISDICTION OF THE DISTRICT COURT.

Federal jurisdiction was originally invoked here on the ground of diversity of citizenship, petitioner being a citizen of Texas and Bendix a citizen of Delaware.

REASONS FOR GRANTING THE WRIT.

(1) The United States Court of Appeals for the Seventh Circuit has rendered a decision in conflict with the decision of the Court of Appeals for the Fifth Circuit on the same question.* In *Atlantic Coast Line R. Co.* v. *Davis*, 185 F. 2d 766 (C.A. 5, 1950), plaintiff filed a FELA suit in the Southern District of New York. The case was transferred to the Southern District of Florida on defendant's motion. There two trials were had, both resulting in disagreements, and plaintiff then made a motion to retransfer the case to the Southern District of New York, which the court granted. The Court of Appeals noted that the statute should be so construed as to authorize *only one determination* of the venue for trial and pointed out the hazards resulting in plural orders of transfer saying, p. 769:

> "Considering section 1404(a), supra, in the light of its purpose and its relation to the doctrine of forum

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* If the order of the Court of Appeals for the Seventh Circuit is permitted to stand, and this case is transferred to Texas, the identical question at issue here will be presented to that court. As we have seen, the rule followed in the Fifth Circuit will require this case to be returned to Illinois for trial. We will then have a situation which may deny petitioner the right to try his case in either forum, resulting from a conflict between circuits *in the same case*. This exact situation is now before this Court in *Blaski* v. *Hoffman*, Cause No. 597 (Opinion below 260 F. 2d 317, (C.A. 7, 1958), in which certiorari has been granted.) See also *Ex Parte Blaski*, 245 F. 2d 737 (C.A. 5, 1957), Cert. den., 355 U.S. 872 (1957). This involves a conflict between the same circuits over Section 1404(a). While it is true, the conflict there does not involve the same question, it demonstrates the disparity in construction of this statute between these same circuits and what that disparity may lead to.

non conveniens, but authorizing transfer rather than dismissal of the suit, it could be reasonably argued that the statute envisions and authorizes, after the plaintiff has made the permissible choice of venue, only one determination thereafter of the venue for trial which will best serve the convenience of parties and witnesses, 'in the interest of justice' and that this determination settles the matter. This application of the statute would remove any possibility of shuttling of the cause or of conflict between the several district courts, each of coordinate jurisdiction, which would arise from plural transfers.''

Here it had been determined in 1955 that the Illinois District Court was the proper forum. That decision settled that issue. It was a judicial act done in the exercise of jurisdiction conferred by law.

If with no change in circumstances there are to be plural transfers under Section 1404(a), no litigant will ever know whether he is secure in the particular forum. With the shuttling of the cause between one district court to the other, as the Fifth Circuit wisely envisioned, remedies or defenses will be expensive and difficult. If such were the fact, the statute which was designed to facilitate the administration of justice would in fact operate as a blockade to intelligent workings of the courts. Here, with no change in the circumstances dictating transfer, it was respondent's judicial obligation to dispose of the cause and not to abdicate that jurisdiction through the vehicle of Section 1404(a).

Moreover, as this Court well appreciates, venue is concerned only with the particular forum where a controversy legally instituted may be determined. Venue is a personal privilege and may be waived. Defendant submitted itself to the Illinois forum to the extent of actually going through a trial. In so acting, it waived whatever

privilege it claimed to litigate the cause elsewhere. (See *Fallbrook Public Utility District* v. *United States District Court*, 202 F. 2d. 942, (C.A. 1953) and *Riley* v. *Union Pac. R. Co.*, 177 F. 2d 673, (C.A. 7, 1950) certiorari denied 338 U.S. 911). This principle of waiver of venue demonstrates how there cannot be plural motions made.

(2) The United States Court of Appeals for the Seventh Circuit has erroneously decided an important question of federal law which has not been, but should be, settled by this Court to effect the orderly administration of justice.

In this case a petition to transfer, under the provisions of Section 1404(a) of the Judicial Code was filed on October 24, 1954, and denied on October 31, 1955. Thereupon the petitioner proceeded with the necessary preparations for trial, including depositions, interrogatories, pretrial conferences, etc. The case was finally reached on January 13, 1958, and tried, resulting in a disagreement on February 4, 1958. Counsel for the defendant thereupon filed another motion to transfer this case, which motion was granted by another judge, who did not have the record before him.

In the Reviser's Notes to Sec. 1404(a) it is stated that the section "requires the court to determine that the transfer is necessary for the convenience of the parties and witnesses, and further, that it is in the interest of justice to do so."

The following facts, all uncontroverted and substantiated by oath, demonstrate what injustice is wrought by plural transfers, and how the very purpose of the statute is defeated:

(a) This is not a case of "shopping for a forum." Bendix was not amenable to service of process in the State of Texas at the time of the occurrence. Petitioner filed a suit in California in December 1953, wherein defendant was subject to service of process, but petitioner's claim was defeated by defendant's plea of the one-year California Statute of Limitations; petitioner thereafter brought this suit in Illinois, where defendant was subject to service of process; only after the filing of this suit it developed that the defendant appointed a registered agent in Texas on January 29, 1954.

(b) This case involves an oxygen regulator which is a small circular device approximately five inches high and six inches in diameter. Its function is to regulate the flow of oxygen in a jet plane from the tank to the pilot who inhales it through a mask when flying at high altitudes. Thus there is involved no question of view of the scene.

(c) The Eclipse Pioneer Division of Bendix made this oxygen regulator. At the time the first motion to transfer was denied it was located at Teeterboro, New Jersey, about 825 miles from Chicago and 1600 miles from Dallas, Texas. Subsequent thereto and prior to the trial, the Eclipse Pioneer Division was removed to Davenport, Iowa, approximately 165 miles from Chicago and 635 miles from Dallas, Texas.

(d) The principal witness for Bendix and its only expert was Wesley Sprague, a resident of Davenport, Iowa.

(e) Throughout the trial, Bendix's counsel was assisted by a representative of the Eclipse Pioneer Division of defendant, who was an engineer as well as a lawyer, and he is a resident of Davenport, Iowa.

(f) Petitioner's principal witness was John Trunda, Chief Petty Officer in the United States Navy, with specialized training in oxygen systems and in charge of the maintenance and repair of all oxygen systems at Glenview Naval Air Station, Cook County, Illinois. He not only explained the workings of the regulator system in question, but expressed opinions concerning phases of the operation in question, and particularly the causal relationship between the malfunction of the oxygen regulator manufactured by Bendix and the occurrence in question.

This witness was found only after weeks of intensive research, which revealed that the only sources for an expert in this particular field are: (1) the manufacturer, (2) airplane company employees whose employer uses this particular type of equipment, and (3) United States Naval personnel with specialized training on this type of regulator. In an action against the manufacturer, it is obvious that neither the employees of the manufacturer nor of an airplane company using its equipment would be available to testify.

John Trunda could not go to Dallas, Texas.

(g) Through the consent of Chief Trunda's Commanding Officer, it was possible to produce real evidence in the nature of oxygen regulators of the same character and a diagram approximately three by four feet explaining in detail the operation of the system. These are the property of the United States Navy and were obtained only through Chief Trunda's offices. Inasmuch as neither petitioner nor Bendix, or even Chance-Vought Corporation had possession of a regulator and because such real evidence was necessary for an understanding of the issues, its absence places petitioner at a great disadvantage.

(h) The preparation of this case required one week of intensive study for the lawyer who tried it. That study and that knowledge, as well as the original experience of what occurred at the first trial will be cancelled out by the transfer, since obviously an Illinois lawyer cannot try a case in Texas with any hope for success.

(i) There were three witnesses for Bendix from the State of Texas, each of whom came voluntarily, although one of them had signed an affidavit in connection with the defendant's original motion to transfer to the effect that he would not appear in Chicago for trial. In addition thereto, petitioner used in rebuttal R. C. Carter of Dallas, Texas, who had previously been brought into Chicago by Bendix and released to go home after conferring with defendant's counsel. His testimony that he had been directed to hook up the regulator with the lines crossed after the accident occurred was unimpeached. (The defense was that the lines were crossed and thus the explosion occurred.)

(j) There was no dispute concerning the petitioner's injury, namely, the enucleation of his right eye. His treating doctor gave the only deposition in the case. A Chicago doctor, who examined the man for the purpose of testifying, described his condition and was subjected to no cross examination.

We quote from the opinion of the Court of Appeals:

> "The only other argument of petitioner requiring any discussion is whether the transfer to Dallas would be in the interest of justice. Under this heading is the claim that Chief Petty Officer Trunda cannot attend the trial which will be held in Texas. We doubt that a sufficient showing has been made that Trunda cannot attend any such trial, but assuming such to be a fact, there certainly is no showing that Trunda is the only person who can explain the operation of

an oxygen regulator. Trunda first heard of this case the day before the trial commenced. Trunda undoubtedly has a good working knowledge of the construction and operation of oxygen regulators. He testified he had had two short courses pertaining thereto while in the navy. However, there is no showing he is a highly trained expert.'

"Glenview Naval Air Station is not a major overhaul station for oxygen regulators. There are four such in the country, one being at Corpus Christi, Texas. It is difficult to understand why a satisfactory 'expert' would be available at Glenview and none at a major overhaul station such as Corpus Christi, Texas."

There was neither evidence nor an affidavit:

(a) To controvert Trunda's inability to go to Texas;

(b) To question the difficulty petitioner had in finding experts on oxygen regulators;

(c) To support a statement that Trunda first heard of this case the day before the trial commenced, or that he is not a "highly trained expert"; or

(d) To justify classification of Glenview Naval Air Station as compared to other Naval stations.

It must be remembered that none of the foregoing was before the respondent, and hence not before the Court of Appeals.

Thus it appears that the Court of Appeals decided against petitioner without factual support in the record.

The Court of Appeals for the Seventh Circuit erroneously held that plural motions may be made under Section 1404 (a). The result of this error in interpreting this important federal statute is projected when it is realized that after the case has been pending four years with one

trial, the litigant is thrown into another forum. To allow plural decisions on the propriety of the forum cannot but result in harrassment and oppression, for which this statute was certainly never intended.

The principle involved here transcends this case in importance. Litigants are entitled to a trial in that forum which has once been decided proper.

Before closing, we believe it proper to note that the Court of Appeals for the Seventh Circuit, in *Chicago, R. I. & P. R. Co. v. Igoe*, 220 F. 2d 299, (Pet. for cert. denied, 350 U.S. 822, 1955) held that mandamus was a proper remedy by which to review the action of the trial court in passing upon an application for transfer under Section 1404(a).

CONCLUSION.

The question presented involves not only John Sypert but every litigant in a Federal Court action.

If a litigant never knows, after a decision on a motion under Section 1404(a), whether he is in the proper forum, that statute, instead of facilitating the interests of justice, will become a judicial blockade to the simple and rapid disposition of litigation. But Congress did not intend it as such.

Today, as this Court knows, the delay and expense of obtaining justice is a matter of public concern.

It is respectfully submitted that certiorari be granted so that this problem might be solved.

Respectfully submitted,

JAMES A. DOOLEY,

Attorney for Petitioner.

APPENDIX.

IN THE

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

No. 12539 SEPTEMBER TERM, 1958, APRIL SESSION, 1959.

JOHN SYPERT,
Petitioner,

v.

HONORABLE JULIUS H. MINER, Judge of the United States District Court for the Northern District of Illinois, Eastern Division,
Respondent.

Petition for Writ of Mandamus

April 28, 1959

Before DUFFY, *Chief Judge*, and PARKINSON and KNOCH, *Circuit Judges.*

DUFFY, *Chief Judge.* This is a petition for a writ of mandamus. Petitioner asks that respondent be directed to vacate and set aside an order in a case which was pending in the United States District Court for the Northern District of Illinois, entitled: "*Johnny Sypert* v. *The Bendix Aviation Corporation*, Civil Action No. 54 C 1112." The order attacked is one whereby the cause was transferred to the United States District Court for the Northern District of Texas at Dallas, Texas.

For a number of years, petitioner has resided and still resides in Dallas, Texas. In 1952 he was employed as an aviation mechanic in the plant of Chance-Vought Aircraft

Corporation in that city. On August 18, 1852, he received injuries while at work which he claims resulted from the explosion of an oxygen regulator manufactured by Eclipse Pioneer Division of defendant corporation. Defendant was organized under the Laws of the State of Delaware.

On December 8, 1953, plaintiff Sypert instituted suit against defendant in the United States District Court for the Northern District of California. After defendant pleaded the one-year California Statute of Limitations, plaintiff dismissed the suit.

On January 29, 1954, defendant received a permit to transact business in the State of Texas, and at the same time appointed a registered agent who resided in Dallas, Texas. More than six months later, on August 3, 1954, plaintiff instituted suit in the United States District Court for the Northern District of Illinois, and the cause was assigned to Honorable Julius J. Hoffman, one of the Judges of that Court.

On October 26, 1954, defendant filed a motion to transfer the cause to the State of Texas pursuant to Title 28 U.S.C.A. §1404(a). Briefs were filed and on October 31, 1955, Judge Hoffman denied the motion to transfer. On January 13, 1958, trial was commenced before Judge Hoffman and the cause was submitted to a jury, but the jury was unable to agree upon a verdict. Thereafter the cause was assigned to the calendar of Honorable Julius H. Miner, the respondent herein.

On March 5, defendant again moved to transfer the cause to the State of Texas. We learn from the motion papers and the record before us that on the trial before Judge Hoffman, seven witnesses testified for plaintiff, five of whom were brought from Texas to Chicago. Four witnesses testified for defendant, three of whom were brought from Texas, and one, defendant's mechanical engineer, resided in Davenport, Iowa. All of the occurrence witnesses reside in Dallas, Texas. The four doctors who treated plaintiff at Baylor Hospital in Dallas, all reside

and have their offices in that city. There is a showing that the testimony of at least one witness who lived in Texas and who could not be present at the Chicago trial, was offered by deposition. Defendant also claims that testimony of certain prospective witnesses was not presented at the trial because their presence could not be compelled in Chicago; also that certain documents and reports are available and subject to subpoena in Dallas. Both sides agree that substantive Texas law must be applied.

Plaintiff, the petitioner herein, strongly objects to the transfer, claiming that plaintiff would have to engage a Texas attorney "who would be without the benefit of the technical knowledge necessary to present the case, and who would likewise be without first hand knowledge of what had occurred at the first trial." However, plaintiff's principal objection seems to be that an expert witness who testified at the trial cannot go to Texas. This witness is Chief Petty Officer John Trunda who is stationed at the Naval Air Station at Glenview, Illinois. Just why Trunda cannot attend the trial in Texas is not explained. The claim is also made that Trunda's commanding officer permitted two oxygen regulators to be used at the trial for demonstration purposes.

In the court below, petitioner argued that Judge Hoffman's denial of a motion to transfer the cause to the United States District Court at Dallas, Texas, prevented Judge Miner from entering an order granting the transfer because of the doctrine of *res judicata*. On this appeal, petitioner does not use the words "*res judicata*" but does raise the question whether in a multi-judge court after one judge has denied a motion to transfer, another judge in the same court may thereafter order a transfer.

Implicit in the doctrine of *res judicata* is a final judgment. In the case at bar no final judgment has been entered. We hold Judge Miner had the power and the right to entertain the second motion for transfer.

Considerable emphasis is given by respondent to the fact that in another case, Judge Hoffman stated from the bench that he had made a mistake in denying the motion to transfer in the instant case. It may be a matter of interest that Judge Hoffman has changed his view. However, we are certain that when Judge Hoffman declined to enter the order, he was of the opinion he had sufficient grounds for so doing. Therefore, we give no effect one way or the other to the fact that the Judge may have since changed his mind.

Petitioner points out that the affidavit submitted by defendant's attorney did not list the witnesses or state the testimony that such witnesses would give. Petitioner cites *General Portland Cement Co.* v. *Perry*, 7 Cir., 204 F. 2d 316. That case is not applicable here. In the case at bar a trial had already been held and it is a fair inference that the principal witnesses who testified at the first trial would also give testimony in the second. The records of the District Court revealed the names of the numerous witnesses who resided in Dallas.

Both sides cite *Chicago, Rock Island and Pacific R.R. Co.* v. *Igoe*, 7 Cir., 220 F. 2d 299. In that case we discussed in some detail the three factors prescribed by Title 28 U.S.C.A. §1404(a) which a trial court must consider on motions to transfer a cause. These are 1) the convenience of the parties; 2) the convenience of the witnesses; and 3) the interest of justice.

In spite of the arguments of plaintiff's trial counsel who lives in Chicago, the convenience of the parties and the convenience of the witnesses will best be served by a trial at Dallas, Texas. The only one who might be inconvenienced is plaintiff's Chicago counsel, and that is not a controlling factor. There are no controverted questions in this case which depend upon any event occurring in the Northern District of Illinois.

(Appendix)

The only other argument of petitioner requiring any discussion is whether the transfer to Dallas would be in the interest of justice. Under this heading is the claim that Chief Petty Officer Trunda cannot attend the trial which will be held in Texas. We doubt that a sufficient showing has been made that Trunda cannot attend any such trial, but assuming such to be a fact, there certainly is no showing that Trunda is the only person who can explain the operation of an oxygen regulator. Trunda first heard of this case the day before the trial commenced. Trunda undoubtedly has a good working knowledge of the construction and operation of oxygen regulators, He testified he had had two short courses pertaining thereto while in the navy. However, there is no showing he is a "highly trained expert."

Glenview Naval Air Station is not a major overhaul station for oxygen regulators. There are four such in the country, one being at Corpus Christi, Texas. It is difficult to understand why a satisfactory "expert" would be available at Glenview and none at a major overhaul station such as Corpus Christi, Texas.

We note an increased number of petitions for mandamus where contested motions for transfer under §1404(a) are involved. Apparently a number of attorneys are filing petitions for mandamus under circumstances where an appeal might be taken in an ordinary case.

In *Chicago, Rock Island & Pacific R.R. Co.* v. *Igoe*, 7 Cir., 220 F. 2d 299, we pointed out in some detail (page 304) that to warrant action by our Court, in passing on such petitions, something more must be shown than an erroneous decision by the District Court. We emphasized that an abuse of discretion must clearly appear. Mandamus is a drastic and extraordinary remedy and petitions therefor hereafter filed in this Court which, in fact, involve only an erroneous decision will, in all likelihood, be summarily denied. Members of the Bar should not file petitions for mandamus in transfer cases unless they can make out a strong case of abuse of discretion.

(Appendix)

There was no abuse of discretion by Judge Miner in transferring the cause to Dallas, Texas. The petition for mandamus is

DENIED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.